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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 698

FRANK SEIDEN, MILTON SEIDEN AND LEON SEIDEN, PETITIONERS

v.

JESS LARSON AND PAUL L. MATHER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the Court of Appeals (R. 75-82) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 15, 1951 (R. 83). The petition for a writ of certiorari was filed April 25, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Fee title to property owned by petitioners was acquired by the United States during World War II for naval purposes. Part of the property was sold to petitioners pursuant to the Surplus Property Act of 1944 as amended. This suit relates to the remaining portion of the property which was a golf course at the time of acquisition, upon which some $4,000,000 had been expended by the United States in construction of roads, streets, barrack buildings, service buildings, etc., and which is now used for veterans housing. The questions presented are :

1. Whether institution of a suit seeking, in effect, to compel conveyance of this property to petitioners constitutes an attempt to sue the United States without its consent.

2. Whether the administrative determination that this property was not subject to the preferential repurchase right given to former owners by the Surplus Property Act was plainly erroneous.

3. Whether the fact that petitioners had asserted such repurchase right prior to December 31, 1949, empowers the courts now to direct recognition of such right despite repeal of the Surplus Property Act by the Federal Property and Administrative Services Act of 1949 with the proviso that "all priorities and preferences * * * shall continue in effect * * * until December 31, 1949."

STATUTES INVOLVED

The Surplus Property Act of October 3, 1944, 58 Stat. 765, as amended by the Act of August 7, 1946, 60 Stat. 886, provided:

Section 23 (a) (1), 50 U.S.C. App. 1632 (a) (1)—

> (1) The term "real property" means property consisting of land, together with any fixtures and improvements thereon (including hotels, apartment houses, hospitals, office buildings, stores, and other commercial structures) located outside the District of Columbia, but does *not* include (A) commercial structures constructed by, at the direction of, or on behalf of any Government agency, (B) commercial structures which the Administrator determines have been made an integral part of a functional or economic unit which should be disposed of as a whole, and (C) *war housing,* industrial plants, factories, airports, airport facilities, *or similar structures and facilities, or the sites thereof, or land which the Administrator determines essential to the use of any of the foregoing;* * * * [Italics supplied]

* * * * *

Section 23 (c), 50 U.S.C. App. 1632 (c)—

> Immediately after the reporting of surplus real property to the Board under section 11, the Board shall classify such property as agricultural, grazing, forest, mineral, or otherwise, as it may deem advisable. The classification

may be revised from time to time. The classification of property by the Administrator (including the determination of whether property is "real property" as defined in this section) shall be based on the highest and best use of the property at the time it is reported as surplus property regardless of its former character or use.

* * * * *

Section 23 (d) (1) (A), 50 U.S.C. App. 1632 (d) (1) (A)—

(d) (1) (A) In the case of any surplus real property which was acquired by any Government agency after December 31, 1939, the person from whom such property was acquired shall be given notice, in such manner (which may include publication) as the Board by regulation may prescribe, that the property is to be disposed of by the United States and shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person, at private sale at any time during the period of ninety days following such notice: *Provided,* That such period shall be extended in any case when it appears that such extension is necessary or appropriate to facilitate the sale of any surplus real property under this subsection.

* * * * *

Section 34 (b), 50 U.S.C. App. 1643 (b)—

Nothing in this Act shall impair or affect the provisions of * * * Public Law 849, Seventy-

sixth Congress, as amended, respecting war housing and facilities; * * *

* * * * * *

Section 502(a) of the Federal Property and Administrative Services Act of June 30, 1949, 63 Stat. 399, provides:

> There are hereby repealed—
>
> (1) the Surplus Property Act of 1944, as amended (except sections 13 (d), 13 (g), 13 (h), 28, and 32 (b) (2), and sections 501 and 502 of Reorganization Plan Numbered 1 of 1947): *Provided,* That, with respect to the disposal under this Act of any surplus real estate, all priorities and preferences provided for in said Act, as amended, shall continue in effect until 12 o'clock noon (eastern standard time), December 31, 1949;

STATEMENT

This suit was instituted by complaint filed December 29, 1949, for injunctive relief against officials charged with the disposal of surplus property. The case was dismissed upon motion for summary judgment. The facts, as they appear from the complaint and affidavits submitted in connection with the motion, may be summarized as follows:

In 1942 petitioners owned a 169-acre tract on Long Island, New York, upon which they operated a resort hotel, golf course, swimming pools and the like (R. 3). Lido Road, in substance, bisected the

property, some 54½ acres south of the road containing the hotel and some 115 acres north of the road being primarily used for the golf course (See chart opposite R. 28). Condemnation proceedings were instituted on behalf of the Navy Department which culminated in a final judgment in 1945, resulting in acquisition of fee title to the land and improvements and also in the acquisition of furnishing and equipment, $1,300,000 being paid petitioners for the fee title and $232,500 for its use between 1942 and 1945 (R. 40, 57). During occupancy by the Navy some improvements were made to the hotel but most of the changes, amounting to more than $4,000,000, represented the construction of barracks, administrative buildings, streets, highways and similar installations on the former golf course area (R. 41, 58).

After hostilities ceased, the Department of the Navy issued a permit to the Federal Public Housing Authority covering some of the property north of Lido Road and the Authority in turn contracted with the New York State Division of Housing for use of the property for veterans emergency housing (R. 42). That organization converted the barracks, buildings, etc., into structures suitable for family use and the housing project is still in operation (R. 42, 70-72).

The entire property was declared surplus by the Department of the Navy in May 1947 and turned over to the War Assets Administrator, subject to the housing permit mentioned above (R. 41,

56-61). The portion of the property south of Lido Road containing the hotel and beach was classified as "Commercial Section 23", meaning property to which the preference right to repurchase given by the Surplus Property Act applied, and this property was sold to petitioners (R. 43-44). The property north of Lido Road was classified "Non-Section 23—Real Property (War Housing)" meaning that the former-owner priority did not apply because that priority does not apply to "war housing * * * or similar structures and facilities, or the sites thereof, or land which the Administrator determines essential to the use of any of the foregoing;" (*supra*, p. 3) (R. 43, 63). In 1949 some 35 acres of the land north of Lido Road was conveyed to a local school district pursuant to the provision of section 13 of the Surplus Property Act relative to disposal of property for educational uses (R. 45).

In July 1949 petitioners asserted a "former-owner" priority to purchase the land north of Lido Road, and correspondence was exchanged, a hearing was had before the General Board, War Assets, General Services Administration, resulting in reaffirmation of the conclusion that the land was "Non-Section 23" real property (R. 21-27, 44). On December 21, 1949, an advertisement was made soliciting bids until January 10, 1950, subject to the existing occupancy for veterans housing (R. 9-10).

This suit was instituted December 29, 1949, seeking an injunction against the receipt of bids or the taking of any other action directed to transferring title to anyone except petitioners; against permitting anyone to occupy the premises in a manner which would deprive petitioners of their alleged right of immediate possession; and against classifying the property as free of the alleged priority under Section 23 of the Surplus Property Act (R. 5-7). The trial court dismissed the complaint (R. 55). The Court of Appeals affirmed on the grounds that this proceeding constituted an attempt to sue the United States without its consent (R. 77-79) and, alternatively, that the administrative conclusion was not a capricious exercise of power (R. 79-82). It found it unnecessary to decide whether as a result of the termination of priorities on December 31, 1949, petitioners lost whatever standing they had to prosecute this suit (R. 77, fn. 8).

ARGUMENT

1. Recognizing that the purposes to be served by the system of priorities and preferences relating to surplus property resulting from World War II had been accomplished, Congress terminated those priorities on December 31, 1949. It is thus plain that the issue whether such priority was erroneously denied in the instant case does not present an important question warranting review by this Court. Moreover, the decision below is clearly correct.

2. Title to the property here involved is admittedly in the United States. And, as the court below stated (R. 79), the ultimate relief sought by petitioners, while expressed in negative terms, is conveyance of the property to them. It is settled that such a proceeding constitutes a suit against the United States. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 388; *Mine Safety Co.* v. *Forrestal,* 326 U. S. 371; *Morrison* v. *Work,* 266 U. S. 481. The language of *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, concerning "common law wrongs" (Pet. 7), does not aid petitioners since the court was there discussing cases where the plaintiff claimed title and hence, absent justification of governmental authority, the defendant officers would be committing a trespass.

Petitioners rely (Pet. 8-10) upon cases such as *Santa Fe Pac. R. R. Co.* v. *Fall,* 259 U. S. 197, and *Payne* v. *Central Pac. Ry Co.,* 255 U. S. 228, where relief was available by means of mandamus because the Government officer was under a ministerial duty to dispose of government property in a particular manner. As will more fully appear from our discussion of the merits, *infra,* this case presents a situation where the administrative officer is vested with discretion and his determination is not plainly wrong. In such cases mandamus does not lie. *Wilbur* v. *United States,* 281 U. S. 206, 218-219; *Work* v. *Rives,* 267 U. S. 175, 177-178; *Hall* v. *Payne,* 254 U. S. 343, 347-348; *Riverside Oil Co.*

v. *Hitchcock*, 190 U. S. 316, 324-325. Petitioners approach this case as if Congress had granted judicial review of the administrative determination. Thus, they rely on *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80 (Pet. p. 24) and *United States* v. *Idaho*, 298 U. S. 105, where the statutes specifically provided for judicial review.[1] The limited nature of review of determinations relating to the disposal of surplus property is emphasized by the fact that such determinations were excluded from the operation of the judicial review provisions of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1001(a).

3. The exclusion of this property from the "former owner" priority was clearly proper. The Surplus Property Act (sec. 23(c)) vested in the Administrator the duty of classifying surplus property "including the determination of whether property is 'real property' as defined in this section". The administrative discretion was further emphasized by the provisions that the classification "shall be based on the highest and best use of the property at the time it is reported as surplus property regardless of its former character or use" and that the classification "may be revised from time to time". This property, though originally a golf course, had been improved through the ex-

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[1] *Arenas* v. *United States*, 322 U. S. 419 (Pet. p. 24) was a suit brought under a special act vesting the courts with jurisdiction over the subject matter.

penditure of some $4,000,000 by housing structures. At the time it was declared surplus in 1947 and when the classification was reviewed in 1949, it was occupied for housing veterans and their families. As the court below concluded (R. 82), the conclusion that the term "war housing * * * or similar structures and facilities" included this property "would seem to be well founded".

Petitioners' attack upon the administrative conclusion is based almost entirely on a very narrow reading of the term "war housing" as housing constructed under the Lanham Act (Pet. 20-23). Such a view would simply read the phrase "war housing" out of section 23 of the Surplus Property Act since section 34(b) of the Act excluded Lanham Act housing from all the provisions of the Act. And, as the court below noted (R. 81, fn. 14), a substantial amount of housing for defense and war purposes was constructed under statutes other than the Lanham Act. With the many facets of the surplus property program in mind (cf. R. 80), the exclusion of the property north of Lido Road from the former-owner priority was clearly correct.[2]

---

[2] Petitioners now say that they do not seek to curtail the occupancy for veterans housing (Pet. 4). However, in their complaint (R. 4-5) they alleged that such occupancy was contrary to the Surplus Property Act and that they were entitled to immediate possession and such is the logical result of acceptance of their argument. And although not directly involved in this case, their argument would, it seems, as alleged in the complaint (R. 4), likewise invalidate the conveyance to the local school district.

4. While this issue was not found necessary to the decision below, it is clear that petitioners now have no priority rights to purchase this government property. In an unambiguous provision, Congress terminated "all priorities and preferences" on December 31, 1949. No exception was made for cases where an alleged right had been asserted either in administrative proceedings or in the courts. Former owners are now in the same position as any other prospective purchaser of the property.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1951.

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against

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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PETITIONERS' REPLY BRIEF

I

The most significant aspect of respondents' brief in opposition is its almost complete disregard of the ground of decision in the Court of Appeals which is the basis upon which certiorari is sought.

As to the major ground below, namely, that where title to property is in the United States, relief sought with respect to the property constitutes an action against the United States, all respondents have to say (p. 9) is that "It is settled that such a proceeding constitutes a suit against the United States". Of the eight cases cited at

pages 8 and 9 of the petition specifically granting relief despite the contention that the suit was against the sovereign, respondents do not mention six of them. As to the other two, the *Santa Fe* and *Payne* cases, respondents say that mandamus was available because the cases involved "a ministerial duty to dispose of government property in a particular manner" (p. 9). Merely characterizing that duty as "ministerial" does not distinguish those cases from the principal case. The duty of the respondents to convey the government property in the principal case in accordance with the explicit statutory direction was certainly no less ministerial than the duty to convey the government property in the *Santa Fe* and *Payne* cases in accordance with the statutes there involved.

In short, respondents fail to meet the issue or to distinguish the numerous cases in which specific relief has been granted with respect to property title to which was in the United States.

II

As to the alternative ground below, that an error of law by respondents in construing their own statutory authority makes the case one against the United States, respondents say nothing. And this despite the fact that the Court below stated specifically that however it might have determined "the question in the first instance", the case fell within the *Larson* doctrine (R. 82).

III

The object of the brief in opposition is to show that petitioners cannot win on the merits even if they are given a hearing on the merits. Thus, it is repeated that respondents had the duty to classify surplus property (p. 10) and,

therefore, had the right to classify this property as "war housing." We went into this matter at pages 15 to 23 of the petition at such length as we believed appropriate in a petition for certiorari. We pointed out there that what respondents attempted to do here is not to classify the property but to re-define a term used by Congress, a term of common significance, with a legislative history which does not admit of the distortion sought by respondents. Therefore, we respectfully submit that if this case were considered on the merits, the determination below could not be sustained.

IV

As further support for freedom of action by respondents, it is said that the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 USC 1001(a), does not provide for judicial review of the decision of this administrator (p. 10). There may have been many reasons for this, but it is evident that one good reason is that the Administrative Procedure Act is designed to cover cases of regulatory federal commissions and similar bodies which hold hearings, weigh evidence and reach decisions governing the conduct of citizens. By not providing for such agencies as this, Congress did not manifest an intent that this agency or any like it should escape review in the courts and have arbitrary power whereas regulatory commissions, which do have forms and procedures amounting to due process, should be restricted.

V

Respondents say that the termination of priorities on December 31, 1949 is relevant for two reasons: (1) such rights as petitioners had have been lost, and (2) this is

a non-recurrent case which the court is not justified in reviewing.

The answer to the first proposition is that the rights of these petitioners were not lost. According to respondents' own Regulations:

> "Offers from priority holders at their respective established considerations shall be accepted in the order of their priority. * * * Disposal agencies may reject any offer which is below the fair value of the property *other than an offer from a priority holder* for the maximum consideration established for a transfer to such a priority holder." (Italics ours.) (13 Fed. Reg. 4736, 4743.)

Thus, before the expiration of the statute, petitioners had exercised their priority and their offer could not be rejected. Here as in the *Santa Fe* case and in the *Payne* case, the rights of petitioners were fully vested before the termination of the priorities. (This is wholly apart from such bearing as the wilfullness on the part of respondents in delaying the advertisement to a time when they thought petitioners would not be able to exercise their priority, may have.)

We are not in position to know how many similar cases there are under this statute or how many there are or may be under other statutes. But the question on which certiorari is sought is not limited to the Surplus Property Act or any other particular act. The ruling of the Court of Appeals was that this was a suit against the United States and therefore that the merits cannot be reached. That, as we have demonstrated in our petition, is a recurrent question and one which is of wide general importance.

VI

Finally, respondents, at no fewer than three places (pp. 2, 6 and 11), point out that the United States spent some $4,000,000 on this property. The fact is that the property was not improved by the expenditure any more than the country was enriched by the millions of dollars expended on exploded and unexploded shells during the war. Respondents did not bring to the Court's attention the fact that the record shows, without dispute, that the expenditures by the United States have resulted in a decrease, rather than an increase, in the land value (R. 34, 38).

That this statement by petitioners' expert was sound was borne out when the bids were subsequently opened and it was found that the highest legitimate bid, apart from petitioners' bid, was $91,500 for the land on which the United States had expended these $4,000,000 (R. 48). Of course, petitioners' bid of $125,000 took into account the special value of the land to petitioners.

Conclusion

It is respectfully submitted that the brief in opposition has completely avoided the issue of whether this Court should review the holding that this is a suit against the United States. It is respectfully submitted that the decision below is contrary to the decisions in numerous cases decided by this Court, cases which respondents do not even attempt to distinguish. Respondents' arguments that certiorari should not be granted because, in any event, respondents would be sustained on the merits, cannot be properly considered on this petition where the matter cannot be fully explored; but we respectfully submit that there

is no reason to believe that respondents are right on the merits; on the contrary there is every reason to believe that they are wrong. Respondents have wilfully brought petitioners' property into a statutory definition which cannot possibly include that property. Under respondents' own Regulations petitioners' offer to repurchase in accordance with the statute was an offer which could not be rejected and thus vested and survived the lapse of the statute.

The question before the Court—presented by the adjudication below—is whether this is a suit against the United States. That is the only question resolved by the Court of Appeals. We respectfully submit that this question should be determined here.

Respectfully submitted,

May 25, 1951.

NORMAN WINER,
ALFRED B. NATHAN,
Counsel for Petitioners.